80554-7

No. 259471

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WASHINGTON MOTORSPORTS, LTD., by and through Barry W. Davidson, in his capacity as Receiver and as Acting General Partner, Respondent,

v.

LARRY D. WYATT, Petitioner, and LEMASTER & DANIELS, P.L.L.C., a Washington limited liability company, and JANE DOE WYATT, Defendants.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Larry D. Wyatt ("Wyatt") asks this Court to accept review of the decision designated in Part II of this Motion.

II. DECISION

Petitioner requests review of the Order Denying Motion for Change of Trial Judge, entered by Judge Robert D. Austin, Spokane County Superior Court, on February 9, 2007. A copy of the Order is attached to this Motion as Exhibit "B."

III. ISSUES PRESENTED FOR REVIEW

1. Does a defendant in an adjunct proceeding under Washington's receiver statute, chapter 7.60 RCW, lose the statutory, non-discretionary right to a change of trial judge under RCW 4.12.050, based on the requirement that litigation by or against a receiver is "adjunct" to the receivership and "referred" to the receivership judge?

2. Does a non-party to a receivership action under chapter 7.60 RCW lose the statutory, non-discretionary right to a change of judge in a subsequently filed adjunct case because of limited, non-party participation in the receivership action?

IV. STATEMENT OF THE CASE

This action for accounting malpractice was filed against LeMaster & Daniels, P.L.L.C. ("L&D") and Petitioner Wyatt, an L&D member and

accountant, on February 3, 2006. (Complaint, Ex. "A".) The accounting malpractice matter (hereafter, the "L&D Action") was filed adjunct to a receivership action by Washington Motorsports LTD against Spokane Raceway Park, Inc. (hereafter, the "Receivership Action"). Neither L&D nor Wyatt was a party in the Receivership Action. The receiver commenced the Receivership Action pursuant to Washington's receiver statute, RCW 7.60, *et seq.* (Id.) This statute requires all actions by or against a receiver to be "adjunct" to the receivership. RCW 7.60.160.

The Honorable Robert D. Austin had presided over the Receivership Action since it was originally filed in October 2003, as Materne, et al. v. Spokane Raceway Park, et al., (hereafter, the "Materne Action") and continued to preside over the case after he appointed a receiver on July 5, 2005. (Order Denying Motion for Change of Trial Judge, Ex. "B" at 2.) Wyatt had a limited, non-party role in the Materne and Receivership Actions. Wyatt's participation in the Materne Action and subsequent Receivership Action was restricted to: (1) entering a Special Notice of Appearance in the Receivership Action on February 6, 2004, for the stated purpose of receiving all further pleadings regarding the third-party depositions of Mr. Wyatt and other L&D employees in the Receivership Action (Special Notice of Appearance, Ex. "C"); and (2)

responding to requests to produce documents as a non-party. (Order Denying Motion for Change of Trial Judge, Ex. "B" at 2-3.)

The L&D Action was initially assigned to the Honorable Neal Q. Rielly. (Case Assignment, Ex. "D".) Early in the week of May 5, 2006, Wyatt learned for the first time that the L&D Action had been reassigned to Judge Austin, apparently pursuant to RCW 7.60.160. (Declaration of Erica Balazs in Support of Motion for Change of Trial Judge, Ex. "E".)

Without delay, on May 4, 2006, Wyatt filed a Motion, Certificate and Order for Change of Judge. (Motion, Certificate and Order for Change of Trial Judge, Ex. "F".) The Motion for Change of Judge was initially granted, and the matter was reassigned to the Honorable Jerome J. Leveque. (Order of Preassignment, Ex. "G".) Judge Austin then requested briefing on the issue of whether Wyatt, as a party to an adjunct proceeding under chapter 7.60 RCW, had the right to a change of judge under RCW 4.12.050. After briefing and oral argument from both sides, Judge Austin denied Wyatt's Motion for a Change of Judge. (Memorandum Opinion, Ex. "H".)

The Order Denying Motion for Change of Trial Judge has two apparent bases for denying Wyatt's Motion. First, the trial court pointed out that RCW 7.60.160(2) requires litigation by a receiver to be adjunct to a receivership case and also provides that adjunct litigation shall be

referred to the judge assigned to the receivership case. (Order Denying Motion for Change of Trial Judge, Ex. "B" at 5.) The Court held that the provisions of RCW 7.60.160 "take precedence over the general provisions of RCW 4.12.050." (Id.) The trial court noted that the receiver statute rests "discretion in the assigned receivership court," and "shows a legislative intent to vest administrative and judicial control of receiverships and adjunct litigation in one judge so it can be judicially managed as one overall litigation matter." (Id.) Therefore, the trial court concluded that "[a] party in adjunct litigation brought by or against a receiver that is assigned, pursuant to RCW 7.60.160, to the same judge assigned to the main receivership case is not by right entitled to a change of judge in the adjunct case." (Id. at 6 (emphasis added).) The trial court concluded that "[u]nder the circumstances of this case, granting a change of judge could lead to a waste of judicial resources and may lead to inconsistent results." (Id.) The trial court explained that "[a]ffording, as a matter of right, a different judge for each potential claimant may exhaust judicial resources, cause inconsistent results, time delays, and create chaos...." (Id. at 7.)

Second, the trial court recognized that at the time of the ruling on Wyatt's motion for change of judge, "the Court had made no discretionary rulings in this Adjunct Case...." (Id. at 4.) However, the Court concluded

that it had "made numerous discretionary rulings in the Main Receivership Case after the Defendants had jointly filed a Notice of Appearance." (Id. at 5, 7.)

V. ARGUMENT

A. STANDARD OF REVIEW.

Discretionary review is appropriate where the trial court committed "an obvious error which would render further proceedings useless," or "probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of one party to act." RAP 2.3(b)(1), (2).

Here, the trial court's decision to deny Wyatt's Motion for Change of Trial Judge is in conflict with established authority. *See* RAP 2.3(d)(1) (conflict with established appellate case law is a consideration governing discretionary review). The court's decision constitutes probable error and obvious error under RAP 2.3(b). In addition, the decision threatens to render future proceedings useless. If this Court agrees that the Motion for Change of Judge was improperly denied after a full trial, the case would have to be re-tried. In addition, the trial court's decision substantially alters the status quo and substantially limits Wyatt's freedom because he is forced to proceed under apparent prejudicial circumstances.

B. THE TRIAL COURT COMMITTED OBVIOUS OR PROBABLE ERROR IN DENYING THE MOTION FOR CHANGE OF JUDGE UNDER RCW 4.12.050.

Under RCW 4.12.040 and .050, a party litigant is entitled, as a matter of right, to a change in judge upon the timely filing of a motion and affidavit of prejudice against a judge. RCW 4.12.040, .050; see also State v. Cockrell, 102 Wn.2d 561, 565, 689 P.2d 32 (1984); State v. Dixon, 74 Wn.2d 700, 702, 446 P.2d 329 (1968). RCW 4.12.050 expressly entitles "[a]ny party to or any attorney appearing in any action or proceeding in a superior court" to file a motion and affidavit of prejudice against the judge, provided that it is filed before the court rules on any motion or makes a ruling which involves the exercise of discretion. RCW 4.12.050.

It is well-established that a motion for change of judge presents no question of discretion or policy and it must be granted as a matter of right. State v. Mauerman, 44 Wn.2d 828, 830, 271 P.2d 435 (1954). RCW 4.12.050 "was intended to take all discretion in determining prejudice away from the trial judge." Marine Power & Equipment Co. v. State, 102 Wn.2d 457, 461, 687 P.2d 202 (1984). The Supreme Court has recognized that the legislature intended to give litigants the absolute right to recuse one judge when it enacted RCW 4.12.050. See e.g., id. at 460 (noting that RCW 4.12.040 gives every party the right to a change of judge if the requirements of RCW 4.12.050 are satisfied and holding that

"once a party timely complies with the terms of RCW 4.12.050, prejudice is deemed established. Thereafter, 'the judge to whom [the motion] is directed is divested of authority to proceed further into the merits of the action.'"). The Supreme Court in Marine Power & Equipment made clear that "[t]he purpose of RCW 4.12.050 was to remove discretion from the trial court when presented with a motion for change of judge." Id. at 464.

Here, the trial court improperly exercised considerable discretion in denying Wyatt's Motion for Change of Trial Judge. The Court's denial of the Motion was based on: (1) its finding that the "specific" provision of RCW 7.60.160 "takes precedence" over the "general" provisions of RCW 4.12.050, thereby giving the trial court discretion to reject a timely brought motion for a change of judge; and (2) its finding that the trial court had made discretionary rulings in the underlying Receivership Action in which Wyatt had participated only as a non-party. The trial court committed obvious and/or probable error on both issues.

(1) RCW 7.60.160 Does Not "Take Precedence" Over RCW 4.12.050 Because the Two Statutes Are Not in Conflict and Can be Easily Reconciled.

Denying Wyatt's Motion for Change of Trial Judge violates the plain statutory language of RCW 4.12.050 and Supreme Court interpretations which divest the trial court of any discretion under RCW 4.12.050 to deny a timely request for a change of judge. Essentially, the

trial court found certain requirements of RCW 7.60.160 trumped RCW 4.12.050, which then allowed it to exercise discretion to deny Wyatt's Motion for Change of Trial Judge. This was in error.

RCW 7.60.160 provides that "[l]itigation by or against a receiver is adjunct to the receivership case," and that "[a]ll adjunct litigation shall be referred to the judge, if any, assigned to the receivership case." RCW 7.60.160(2) (emphasis added). Based on this statutory language, the trial court found that RCW 4.12.050 is a general statute "regarding seeking a change of judge," but that "RCW 7.60.160 is a specific statute regarding the assignment of adjunct receivership cases to the same judge assigned to the main receivership case." (Order Denying Motion for Change of Trial Judge, Ex. "B" at 5.) Thus, the trial court concluded that "[t]he specific provisions of RCW 7.60.160 regarding assignment of the case take precedence over the general provisions of RCW 4.12.050." (Id.) Under this flawed analysis, all parties to adjunct litigation under RCW 7.60.160 lose the statutory, non-discretionary right to a change of trial judge simply because RCW 7.60.160 purportedly empowers the trial court to administratively manage receivership cases.

Initially, the trial court's conclusion that RCW 7.60.160 specifically addresses the issue of whether a party in a main or adjunct receivership action has the right to request a change of judge is mistaken.

RCW 7.60.160 is silent as to a party's right to seek a change of judge in a receivership action. See RCW 7.60.160. To the contrary, RCW 4.12.050 – not RCW 7.60.160 – is the only stature specifically addressing a litigant's right to seek a new judge. See id.; RCW 4.12.050.

Moreover, the trial court's summary conclusion that RCW 7.60.160 "takes precedence over" RCW 4.12.050 ignores the rule of statutory construction that it attempted to apply. As the Supreme Court has consistently recognized: "A more specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to the extent they cannot be harmonized." Kerr v. Bennett, 134 Wn.2d 328, 343, 949 P.2d 810 (1998) (emphasis added); see also City of Tacoma v. The Taxpayers of the City of Tacoma, 108 Wn.2d 679, 691, 743 P.2d 793 (1987) (holding, "this court gives preference to a more specific statute only if the two statutes deal with the same subject matter and they have an apparent conflict") (emphasis in original). Courts have a "responsibility to harmonize statutes if at all possible, so that each may be given effect." Id.

Here, the trial court failed to address whether RCW 4.12.050 actually conflicts with RCW 7.60.160. It does not. The trial court's analysis omits this essential step in the statutory construction and simply presumes that RCW 4.12.050 and RCW 7.60.160 conflict because they

both deal with the tenuously related topics of "change of judge" and "assignment of adjunct receivership cases." (Order Denying Motion for Change of Trial Judge, Ex. "B" at 5.) The two statutes do not conflict because only one—RCW 4.12.050—addresses a party's right to request a change of judge. Nothing in the receivership statute strips a party of his right to recuse a judge. Rather, RCW 7.60.160 merely provides that the same judge preside over all adjunct matters to the main receivership action. This is an entirely different proposition from whether a party has the right to request a change of the initially assigned judge in the receivership action.

In fact, the two statutes can be easily harmonized by recognizing that the request for change of judge in an adjunct case would also require a change of judge for the receivership. RCW 7.60.160(2) merely states that litigation by or against a receiver shall be "referred" to the judge that is assigned to the receivership case and that such litigation be "adjunct" to the receivership case. Nothing in RCW 7.60.160 (or any other part of the receivership statute) requires receivership and adjunct cases to remain with that same receivership judge, especially considering a motion for change of judge. The trial court failed to realize that if both the receivership and adjunct case are transferred upon a motion for change of

judge, both RCW 4.12.050's and RCW 7.60.160's statutory requirements are met. In short, there is no conflict between these two statutes.

Believing it had discretion to deny a motion for change of judge, the trial court then concluded that Wyatt's statutory request for a change of was inappropriate based on the possibility for inconsistent rulings and a lack of judicial economy. (Id. at 5-7.) This, too, was in error.

The trial court's concern of potentially inconsistent rulings by different courts was misplaced because both the adjunct and main receivership case would be transferred to the same judge upon an appropriate motion for change of judge. Thus, there is no more potential for inconsistent rulings in this matter than there exists in a non-receivership action.

Similarly, concern about judicial economy does not trump a party's statutory right to a change of judge. See State ex rel.Goodman v. Frater, 173 Wash. 571, 24 P.2d 66 (1933); Marine Power & Equip., 102 Wn.2d at 464-65. In Goodman, the Supreme Court considered a motion for change of judge brought by a third-party defendant who had been joined two days into the execution phase of a trial. The Court held that the movant was entitled to a change of judge, despite the obvious interference with the orderly administration of justice. The Court noted: "It is hard to see why, under the circumstances here present, [the movant] should be deprived of

the statutory right simply because she was brought into the case, against her will, after the original complaint was filed or, indeed, after the judgment was entered." Id. at 573; see also Bode v. Superior Ct., 46 Wn.2d 860, 285 P.2d 877 (1955) (holding that a motion for change of judge filed the day prior to hearing was timely because it was filed in compliance with the terms of the statute).

The Court reiterated this position more recently in Marine Power & Equipment, when it declined to adopt a rule granting the trial court discretion in "special cases" of "complex litigation." Marine Power & Equip., 102 Wn.2d at 464-65.

> The purpose of RCW 4.12.050 was to remove discretion from the trial court when presented with a motion for change of judge ....Were we to adopt the rule suggested by DOT, judges would have discretion to determine whether a case is sufficiently complex to warrant departure from the general rule and, if so, whether a party's motion is filed sufficiently soon. Such a rule would clearly contravene legislative intent.

Id. at 465 (emphasis added).

While the Marine Power & Equipment Court did not rule out entirely that an extraordinary case may be presented in which the difficulties of obtaining an alternate judge are "proven by the Court's factual findings to be insurmountable," the Court directed that the solution

was not to empower the trial court with discretion to reject a motion for a change of judge, but rather "to create a further timeliness requirement to facilitate the orderly administration of justice." Marine Power & Equipment, 102 Wn.2d at 464 (emphasis added). Here, the trial court made no finding about the difficulty of finding a substitute judge to preside over the L&D Action and/or the Receivership action.

Further, the Court in Marine Power & Equipment considered that the DOT had joined the objecting party. As the Court explained, the Attorney General had "only himself to blame for the additional cost and delay incurred by the late joinder." Id. at 461. This same analysis applies here, where Wyatt is an involuntary defendant in the L&D Action. The receiver has no standing to complain when it was he who delayed bringing claims against Wyatt until after multiple proceedings in the Receivership Action had already occurred. The court's weighing of judicial economy concerns against Wyatt—who brought his recusal motion within days of the L&D Action being assigned to Judge Austin—was misplaced under well-established case law.

In sum, the court committed obvious or probable error in denying Wyatt's Motion for Change of Trial Judge under the guise of discretionary authority under RCW 7.60.160. The court's decision conflicts with substantial authority regarding the non-discretionary nature of a motion

for change of judge, as well as the rules of statutory construction. Under this authority, RCW 4.12.050 does not conflict with RCW 7.60.160, and thus, does not take "precedence" over the statutory, non-discretionary right to a change of judge under RCW 4.12.050.

(2) The Motion for Change of Judge Complied With RCW 4.12.050.

The Court's denial of Wyatt's Motion for Change of Trial Judge is also apparently based on its finding that Wyatt did not comply with the procedural requirements of RCW 4.12.050. While the trial court recognized that it had not made any discretionary rulings in the L&D Action prior to Wyatt's Motion for Change of Trial Judge (see Order Denying Change of Judge, Ex. "B" at 4), it noted that it "has made numerous discretionary rulings in the Main Receivership Case, and LeMaster & Daniels and Wyatt have participated therein as described above after they filed their Special Notice of Appearance." (Id. at 5, 7.) This conclusion erroneously assumes both that RCW 4.12.050 would have allowed Wyatt to obtain a change of judge in the Receivership Action, and that the L&D Action is the same case as the Receivership Action.

RCW 4.12.050 allows "[a]ny party to or any attorney appearing in any action or proceeding in a superior court" to file a motion for change of judge by "motion and affidavit . . . filed and called to the attention of the

judge before he shall have made any ruling whatsoever in the case. . . ." RCW 4.12.050 (emphasis added). If a statute's meaning is clear on its face, the court "must give effect to that plain meaning as an expression of legislative intent." Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). An unambiguous statute should not be subjected to judicial construction. Fraternal Order of Eagles, Tenino Aerie v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

RCW 4.12.050 unambiguously permits "any party" to an action to file a request for change of judge. See RCW 4.12.050 (allowing "[a]ny party to or any attorney appearing in any action of proceeding in a superior court" to file an affidavit of prejudice) (emphasis added); see also Riverpark Square, LLC v. Miggins, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (holding that in order to file a successful motion for change of judge, the applicant "must be a party to the action and establish prejudice by motion, supported by affidavit) (citing RCW 4.12.050) (emphasis added). A party is "an interested litigant whose name appears of record as a plaintiff or defendant or some other equivalent capacity, and over whom the court has acquired jurisdiction." In re Special Inquiry Judge, 78 Wn. App. 13, 16, 899 P.2d 800 (1995). It is undisputed that Wyatt was never a party of record in the Receivership Action.

Rather, Wyatt had a limited, non-party role in the Materne and Receivership Actions. His counsel appeared under a special, limited notice of appearance to defend Wyatt at his third-party deposition and to respond to other third-party discovery and deposition requests. Based on this limited involvement by a non-party in the Receivership Action, the trial court read an exception into RCW 4.12.050 which would allow non-parties to file a Motion for change of judge if they have some level of participation in that case. (See Order Denying Motion for Change of Trial Judge, Ex. "B" at 7.) Indeed, under the trial court's finding, such a non-party is required to exercise a non-party "right" to a change of judge or waive that right in subsequent adjunct litigation in which he or she is actually a party. The trial court's interpretation is not permitted under the plain reading of the unambiguous text of RCW 4.12.050, which allows only for a "party" or "attorney" to file a motion for change of judge.

Further, such an interpretation has been rejected by Washington courts. In River Park Square, LLC v. Miggins, 143 Wn.2d at 79-80, Washington's Supreme Court upheld the trial court's denial of a non-party's motion for change of judge, despite the fact that the non-party had "participated" in the case by filing a motion for intervention. See also In re Special Inquiry Judge, 78 Wn. App. at 16 (finding that non-party

witness was not a "party" for purposes of RCW 4.12.050 and did not have the right to file a motion for change of judge).

In addition, RCW 4.12.050 unambiguously requires a party to file a motion for a change of judge before the judge has "made any ruling whatsoever in the case. . . ." RCW 4.12.050 (emphasis added). The court's interpretation of RCW 4.12.050 as requiring Mr. Wyatt to have made a motion for change of judge in the Receivership Action assumes that the L&D Action is the same case as the Receivership Action. However, the L&D Action is separate cause of action for purposes of RCW 4.12.050. It is an accounting malpractice action that arises under different facts and seeking different relief than the Receivership Action.

In Mauerman, the Supreme Court considered a trial court's denial of a motion for change of judge in a petition for modification and finding that the motion was "untimely" because the judge had presided over the initial custody proceeding. Mauerman, 44 Wn.2d at 830. In overturning the decision, the Court found that because the modification proceeding presented "new issues arising out of new facts," the trial court erred in denying the change of judge, which should have been granted "as a matter of right." Id. Thus, even though the L&D Action is related to the Receivership Action, it is a separate cause of action for purposes of RCW 4.12.050, and Wyatt was not allowed to file a motion for change of

judge in the L&D Action. Wyatt only possessed the ability to exercise his absolute right for a change in judge after he became a party, which occurred with the filing of the L&D Action. Upon commencement of that action, it is undisputed that Wyatt exercised his recusal rights under RCW 4.12.050 prior to the trial court issuing any rulings in that case.

Thus, the court committed obvious or probable error in denying Wyatt's Motion for Change of Trial Judge based on Wyatt's non-party participation in the underlying Receivership Action.

C. THE COURT'S DECISION RENDERS FURTHER PROCEEDINGS USELESS, AND IT SUBSTANTIALLY ALTERS THE STATUS QUO.

As discussed, the trial court committed obvious or probable error when it denied Wyatt's Motion for Change of Trial Judge. The trial court's erroneous decision substantially altered the status quo and threatens to make future proceedings useless. *See* RAP 2.3(b)(1), (2).

Because Wyatt is now forced to proceed to trial under the appearance of prejudice, the court has substantially altered the status quo.

Further, the court's error will render future proceedings useless. In the event the matter goes to trial with the presently assigned judge, the matter will need to be re-tried should the Court of Appeals disagree with the trial court regarding the court's decision on Wyatt's recusal motion.

Besides a waste of judicial resources, duplicative trials will undoubtedly render the first trial meaningless.

Courts have recognized the efficiency and economy of resolving appeal issues related to a motion for change of judge in a motion for discretionary review, as opposed to forcing the litigants to proceed to trial and retrying the case after a successful appeal. For example, in Marine Power & Equipment, a commissioner granted the petitioner's motion for discretionary review on this issue and provided for accelerated review and briefing schedule. Marine Power & Equip., 102 Wn.2d at 459. The Court noted that "[t]he Commissioner also ruled that the result of the statute of limitations trial might be void if the trial court was found to have been in error as to its ruling on petitioner's motion for change of judge." Id.; see also Harbor Enter., Inc. v. Gudjonsson, 116 Wn.2d 283, 291, 803 P.2d 798 (1991) (Court recognized the waste of judicial resources of proceeding to trial without seeking discretionary review and indicating preference for discretionary review); see also, Marine Power & Equip., 102 Wn.2d at 459; Hanno v. Neptune Orient Lines, 67 Wn. App. 681, 681, 838 P.2d 1144 (1992) (granting discretionary review on this issue); Public Utility Dist. No. 1 of Klickitat Cy. v. Walbrook Ins. Co. Ltd., 115 Wn.2d 339, 341, 797 P.2d 504 (1990) (same); In re Estate of Black, 116 Wn. App.

492, 496, 66 P.3d 678 (2003) (same); In re Marriage of Tye, 121 Wn. App. 817, 820, 90 P.3d 1145 (2004) (same).

Based on considerations of judicial economy, the Court should exercise its right to review this issue on discretionary review and avoid the possibility that the entire case would have to be retried with a new judge.

V. CONCLUSION

For the reasons set forth above, this Court should grant discretionary review of the trial court's denial of Wyatt's Motion for Change of Trial Judge under RCW 4.12.050.

DATED this 16th day of March, 2007.

LUKINS & ANNIS, P.S.

By _____
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LAURA J. WALDMAN, WSBA #35672
Attorneys for Petitioner Larry Wyatt

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2007, I caused to be served via Hand Delivery a true and correct copy of the foregoing Motion For Discretionary Review addressed to the following:

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Dated this 16th day of March, 2007, at Spokane, Washington.

Bette Brown
Lukins & Annis, P.S.

EXHIBIT A

SUPERIOR COURT, SPOKANE COUNTY,
STATE OF WASHINGTON

WASHINGTON MOTORSPORTS LTD., by and through Barry W. Davidson, in his capacity as Receiver and as Acting General Partner, Plaintiff, v. **LEMASTER & DANIELS, P.L.L.C.,** a Washington limited liability company, and **LARRY D. WYATT** and **JANE DOE WYATT,** husband and wife, Defendants.	Adjunct Case No. 06200566-4 Receivership Case No. 03-2-068564 **COMPLAINT**

Washington Motorsports Ltd., on information and belief, alleges as follows:

PARTIES AND JURISDICTION

1. Washington Motorsports Ltd. ("WML") is a limited partnership formed under the laws of the State of Washington, with its principal place of

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business located in Spokane, Washington. WML has paid all fees due and owing the State of Washington and is in good standing.

2. The Superior Court, State of Washington, County of Spokane, entered an "Order Appointing Barry W. Davidson As Receiver of Washington Motorsports Limited" (the "Receivership Order") on July 1, 2005, in Case No. 03-2-068564 (the "Receivership Case"), that appointed Barry W. Davidson as the General Receiver and acting managing general partner of WML. Barry W. Davidson (the "Receiver") has qualified to serve as the General Receiver by filing an Oath of Receiver, and by filing a Receivership Bond in the amount of $50,000.00, as required by the Receivership Order.

3. LeMaster & Daniels, P.L.L.C. ("LeMaster & Daniels") is a limited liability company existing under the laws of the State of Washington, with its principal place of business located in Spokane, Washington.

4. Larry D. Wyatt ("Wyatt") and Jane Doe Wyatt are husband and wife, constituting a marital community under the laws of the State of Washington. All acts and omissions of Wyatt alleged herein were on behalf of their marital community.

5. Spokane Raceway Park, Inc. ("SRP") was the managing general partner of WML until entry of the Receivership Order. LeMaster & Daniels has been employed as the accountants for WML since 1980.

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6. Orville Moe and Deonne Moe are the controlling shareholders of SRP. Orville Moe ("Moe") is the President and a director of SRP. LeMaster & Daniels has been employed as the accountants for SRP, Moe, and Deonne Moe at all times relevant hereto.

7. U.S. Fast Foods, Inc. ("U.S. Fast Foods") is a corporation existing under the laws of the State of Washington, with its principal place of business located in Spokane, Washington. LeMaster & Daniels has been employed as the accountants for U.S. Fast Foods at all times relevant hereto.

8. Pursuant to RCW 7.60.060(c), the Receiver has the power and right to maintain this action in the name of WML. Jurisdiction and venue over this matter are proper as an adjunct proceeding to the Receivership Case, pursuant to RCW 7.60.160(c).

OPERATIVE FACTS

9. LeMaster & Daniels and Wyatt have been employed as the accountants for WML since 1980. At all times relevant hereto, LeMaster & Daniels and Wyatt, among other tasks, have acted as a bookkeeping service for SRP and WML, have prepared the general accounting for WML, have prepared annual financial statements for WML which included, among other things, a Statement of Partner's Equity, have prepared federal tax returns for WML, and have prepared Schedule K-1's (Form 1065 – Partner's Share of

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Income, Deductions, Credits, etc.) to be used and relied upon by WML and its limited partners which purported to state, among other things, each partner's respective percentage of ownership and of profit and loss sharing. LeMaster & Daniels and Wyatt maintained and from time to time revised WML records of the names of purported WML partners, their purported addresses, their purported ownership interests, and their purported percentages of profit and loss sharing. LeMaster & Daniels and Wyatt otherwise assisted with the maintenance of the partnership records of WML limited partners. LeMaster & Daniels and Wyatt prepared the WML annual financial statement at least as recently as February 5, 2005 and prepared the WML federal income tax return and WML partners' Form K-1's at least as recently as February 18, 2005.

10. The standards which comprise the generally accepted accounting principles ("GAAP") for the form, preparation, and content of financial statements by the accounting profession include both broad guidance and detailed rules meant to ensure that financial statements accurately reflect a company's financial condition and performance.

11. The representations stated in the annual financial statements prepared by LeMaster & Daniels and Wyatt were incorrect, and did not fairly present the financial positions of WML in accordance with GAAP in all

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material respects. The WML tax returns, WML partners' K-1's, and the WML partnership records prepared by LeMaster and Daniels and Wyatt were materially incorrect.

12. LeMaster & Daniels and Wyatt compromised their independence by performing accounting and tax services for WML at the same time that LeMaster & Daniels and Wyatt were employed by SRP, Moe, and U.S. Fast Foods to perform accounting and tax services for those related entitles.

13. In the course of performing accounting services for entities related to WML, LeMaster & Daniels and Wyatt would consistently make accounting and financial decisions that would improve the financial condition of one client at the expense of the other. The overall effect of these decisions damaged WML and the partners of WML, except for Moe and Deonne Moe, Moe and Deonne Moe's relatives and friends, SRP, and U.S. Fast Foods.

14. LeMaster & Daniels and Wyatt's negligence and breach of their contractual obligations concealed the true status of WML's financial condition from the limited partners, and gave SRP, as the managing general partner, and Moe, as the control person of SRP, the latitude needed to improve their position at the expense of the limited partners.

15. In performing their services for WML and its partners,

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LeMaster & Daniels and Wyatt knew, or in the exercise of reasonable care, should have known, that the underlying financial data supplied to it was unreliable because of numerous "red flags" when preparing the WML annual financial statements, including, but not limited to, the lack of documentation on intercompany "loans" from WML to SRP, the lack of documentation on assignments of one or more assets from SRP to WML, the ongoing lack of WML internal controls, the improper use by SRP of WML's assets, and the continuous, improper commingling of the assets and financial affairs or SRP and WML. LeMaster & Daniels and Wyatt knew or should have known of all these alarming conditions, of the incomplete, inaccurate, and deficient financial and partner records, and of the breaches of duty to WML by SRP. LeMaster & Daniels and Wyatt failed to inform either the officers or directors of SRP (other than Moe), or the other limited partners of WML, of these numerous material errors, omissions, and deficiencies. .

16. In the exercise of reasonable care, LeMaster & Daniels and Wyatt were obligated and professionally bound to, among other things: (1) insist that SRP provide appropriate and reliable documentation of transactions affecting WML prior to the preparation of WML annual financial statements, and (2) not assist, aid, or abet the breaches of duty by other LeMaster & Daniels clients to WML. If WML, through its acting managing

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partner SRP, had refused to provide verifiable information and to adopt reasonable cash controls and controls on transactions with related parties, LeMaster & Daniels and Wyatt should have notified the appropriate officers and directors of SRP, other than Moe or Deonne Moe, and notified the limited partners of WML. LeMaster & Daniels and Wyatt should have refused to prepare inaccurate financial statements, tax returns, and K-1's for use by WML and its partners. LeMaster & Daniels and Wyatt failed to do so.

17. LeMaster & Daniels and Wyatt contracted to perform services for WML in 2004 which included preparation of WML's 2003 financial statements, in accordance with the terms of an Engagement Letter that was presented for signature to SRP as Managing General Partner of WML. This Engagement Letter purportedly required WML to indemnify LeMaster & Daniels from any claims made against it because of wrongdoing by its other clients (SRP and Moe), regardless of whether the wrongdoing was contrary to WML's best interests. LeMaster & Daniels did not seek such indemnifications from SRP, U.S. Fast Foods, or Moe or Deonne Moe. LeMaster & Daniels and Wyatt did not inform or notify any officer or director of SRP, or any of the limited partners of WML, of the purported indemnity provision before obtaining Moe's signature on the Engagement Letter. LeMaster & Daniels and Wyatt took the same actions and failures with

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respect to the following year's Engagement Letter that was presented for Moe's signature in early 2005.

18. The actions of LeMaster & Daniels and Wyatt in, among other things, attempting to obtain an undisclosed indemnification from one of their clients for claims arising from the wrongful conduct of their other clients by the signature of one of the persons they knew or should have known to have been a wrongdoer, was a breach of the fiduciary duties of SRP and LeMaster & Daniels and Wyatt. In this and in other ways, LeMaster & Daniels and Wyatt aided, abetted, and furthered SRP's breach of its fiduciary duties to WML.

19. LeMaster & Daniels and Wyatt represented WML on a continuous basis until at least as late as the entry of the Receivership Order. The actions and omissions of LeMaster & Daniels and Wyatt alleged herein were concealed by LeMaster & Daniels and Wyatt from the appropriate officers and directors of SRP and from WML and its limited partners, and were not known to the appropriate officers and directors of SRP, WML, or the Plaintiff, and could not have been known through the exercise of ordinary care, less than two years before the commencement of this action.

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I. FIRST CAUSE OF ACTION

NEGLIGENCE

20. The allegations of the foregoing paragraphs 1 through 19 above are incorporated herein by reference.

21. LeMaster & Daniels and Wyatt owed a duty to WML to perform their work according to the standards, and with the degree of care, that generally prevailed in the accounting profession during the period of their employment.

22. LeMaster & Daniels and Wyatt knew, or should have known, that WML and the limited partners of WML would have a right to rely upon the fact that LeMaster & Daniels prepared the financial statements and tax returns and Form K-1's as evidence that the information set forth in WML's financial statements was accurate and based on reliable information.

23. The accounting services rendered by LeMaster & Daniels and Wyatt to WML were performed negligently and carelessly because, as detailed above, they: (i) failed to conform with GAAP; (ii) were based on records that were facially unreliable; (iii) were based on records that did not have the indicia of reliability necessary to form a basis for tax returns and public use in financial statements; (iv) were not performed with the degree of skill and care commonly applied by and expected from other accounting firms under

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similar circumstances; (v) were not performed with the degree of skill and care that LeMaster & Daniels and Wyatt held themselves out as possessing; and (vi) were not performed with the degree of skill and care called for by LeMaster & Daniels's own internal policies and procedures.

24. The negligence of LeMaster & Daniels and Wyatt includes, but is not limited to: (i) their failure to gather sufficient competent evidential matter to justify the representations set forth in the annual financial statements; (ii) the manner in which they prepared the incorrect annual financial statements, tax returns, Form K-1's, and other materials for WML; (iii) their failure to respond to or adequately disclose known and significant deficiencies in WML's internal accounting records and documentation.

25. As a direct and proximate result of the negligence of LeMaster & Daniels and Wyatt, WML has suffered, and continues to suffer, substantial harm and damage. Such damages include, but are not limited to, the expense of reconstructing accurate partnership records and accounts, and the costs of the Receivership. The Plaintiff is entitled to recover damages from LeMaster & Daniels and Wyatt in an amount to be proven at trial.

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II. SECOND CAUSE OF ACTION

BREACH OF CONTRACT
(Only Against LeMaster & Daniels)

26. The allegations of the foregoing paragraphs 1 through 25 above are incorporated herein by reference.

27. For the fiscal years from 1980 through 2004, LeMaster & Daniels entered into agreements with WML to render proper professional services on behalf of WML, including, without limitation, the preparation of annual financial statements, tax returns, and related services.

28. LeMaster & Daniels breached its agreements with WML by failing to perform its professional services in the agreed upon manner. Among other breaches, LeMaster & Daniels failed to accurately prepare the general accounting for WML, failed to recommend and require adequate controls, failed to accurately prepare annual financial statements for WML, failed to accurately prepare federal tax returns for WML, failed to accurately prepare and distribute correct Schedule K-1's (Form 1065 – Partner's Share of Income, Deductions, Credits, etc.) to limited partners of WML, failed to accurately calculate the capital accounts of the limited partners of WML, and failed to accurately maintain records of WML limited partners.

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29. As a direct and proximate result of LeMaster & Daniels' breach of its agreements, WML has suffered, and continues to suffer, substantial harm, and is entitled to recover damages from LeMaster & Daniels in an amount to be proven at trial.

III. THIRD CAUSE OF ACTION

AIDING AND ABETTING BREACHES OF FIDUCIARY DUTY

30. The allegations of the foregoing paragraphs 1 through 29 above are incorporated herein by reference.

31. The Court, in the Receivership Case, has found as a matter of law, that SRP has committed numerous breaches of its fiduciary obligations to WML.

32. LeMaster & Daniels and Wyatt knew, or should have known, that certain actions of SRP were in breach of its fiduciary obligations to WML.

33. LeMaster & Daniels and Wyatt knew, or should have known, that certain actions taken by LeMaster & Daniels and Wyatt assisted SRP in breaching its fiduciary obligations to WML and in concealing the breaches from the WML partners. The wrongful acts of LeMaster & Daniels and Wyatt aided and abetted the breaches of SRP fiduciary obligations to WML.

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34. As a direct and proximate result of the actions of LeMaster & Daniels and Wyatt, WML has suffered damages as a result of the breaches of fiduciary duty by SRP, including, but not limited to, the expense of reconstructing accurate partnership records and accounts. WML is entitled to recover from LeMaster & Daniels and Wyatt damages in an amount to be proven at trial.

IV. FOURTH CAUSE OF ACTION

DECLARATORY RELIEF

35. The allegations of the foregoing paragraphs 1 through 34 above are incorporated herein by reference.

36. The purported indemnity terms in the previously described Engagement Letters constituted breaches of duty of LeMaster & Daniels to WML and are against public policy.

37. WML is entitled to a declaratory ruling that such indemnity provisions are breaches of duty and are void and unenforceable as against public policy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against each of the Defendants as follows:

1. For all damages according to proof to be determined at trial;

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2. For a Declaratory Judgment that the purported indemnity provisions of the Engagement Letters are against public policy and void and unenforceable.

3. For interest according to law;

4. For reasonable attorneys' fees;

5. For costs of suit; and

6. For such other and further relief as the Court may deem just, equitable, and proper.

DATED this 3rd day of February 2006.

DAVIDSON ❖ MEDEIROS

Bruce K. Medeiros, WSBA No. 16380
Attorneys for Receiver and for Acting General Partner of Washington Motorsports Ltd.
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EXHIBIT B

Honorable Robert D. Austin

FILED

FEB 0 9 2007

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, SPOKANE COUNTY,
STATE OF WASHINGTON

WASHINGTON MOTORSPORTS LTD., by and through Barry W. Davidson, in his capacity as Receiver and as Acting General Partner, Plaintiff, v. **LEMASTER & DANIELS, P.L.L.C.**, a Washington limited liability company, and **LARRY D. WYATT** and **JANE DOE WYATT**, husband and wife, Defendants.	Adjunct Case No. 06-200566-4 Receivership Case No. ~~03-2-06856-4~~ **ORDER DENYING MOTION FOR CHANGE OF TRIAL JUDGE**

THIS MATTER came before the Court on Larry Wyatt's Motion for Change of Judge pursuant to RCW 4.12.050. Having considered the evidence and relevant pleadings, and taking judicial notice of all the contents of the court file and the proceedings occurring before this court in the case now captioned *Washington Motorsports Ltd., v. Spokane Raceway Park, Inc.,* Spokane County Superior Court

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ORIGINAL

Cause No. 03-2-06856-4 ("Main Receivership Case") (to which this case is adjunct), and over which this Court is the presiding Judge, the Court makes the Following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Main Receivership Case was commenced on October 20, 2003. This Court has presided over that case from its inception.

2. On February 6, 2004, LeMaster & Daniels, PLLC, and Larry Wyatt, through their counsel, Lukins & Annis, P.S., filed a Special Notice of Appearance in the Main Receivership Case when it was under the former caption known as *Materne, et al., vs. Spokane Raceway Park, Inc., et al.*

3. On December 23, 2004, Plaintiffs in the Main Receivership Case moved to compel LeMaster & Daniels to produce documents responsive to their Subpoena Duces Tecum.

4. On December 30, 2004, LeMaster & Daniels' counsel filed a Declaration in Response to Motion to Compel in the Main Receivership Case.

5. On May 4, 2005, Larry Wyatt and LeMaster and Daniels filed an Objection To Third Subpoena Duces Tecum for Records Deposition of LeMaster & Daniels in the Main Receivership Case.

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6. On May 5, 2005, Plaintiffs in the Main Receivership Case filed a Second Motion to Compel against LeMaster & Daniels regarding additional documents and another Subpoena Duces Tecum served upon them in the Main Receivership Case.

7. On May 9, 2005, LeMaster & Daniels filed a Response Brief and supporting Declaration from its counsel in the Main Receivership Case.

8. On May 10, 2005, LeMaster & Daniels' counsel appeared in person and argued in opposition to Plaintiffs' Motion to Compel in the Main Receivership Case. The Court granted Plaintiffs' Second Motion to Compel.

9. On July 1, 2005, Barry W. Davidson was appointed Receiver and Acting Managing General Partner of Washington Motorsports Ltd. ("WML") in the Main Receivership Case.

10. After Mr. Davidson was appointed as Receiver of WML, LeMaster & Daniels and Mr. Wyatt did not withdraw their Special Notice of Appearance in the Main Receivership case.

11. LeMaster & Daniels submitted a Proof of Claim against WML to the Receiver in the Main Receivership Case, dated September 9, 2005. The "Declaration of Larry Wyatt in Support of Proof of Claim by LeMaster & Daniels," under the caption of the Main Receivership Case, was attached in support of the Proof of Claim .

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12. On December 28, 2005, LeMaster & Daniels filed, in the Main Receivership Case, a response to the Receiver's Interim Report filed in the Main Receivership Case.

13. On February 3, 2006, WML, through its Receiver, Mr. Davidson, filed the above-captioned case as an adjunct case (the "Adjunct Case").

14. This case was initially assigned to Judge Neal Q. Rielly, but was then reassigned to Judge Robert D. Austin, pursuant to RCW 7.60.160, as a case adjunct to the Main Receivership Case.

15. On February 17, 2006, LeMaster & Daniels filed a Memorandum in Opposition to Motion for Order Authorizing Employment of Reed & Giesa, P.S., and Esler, Stephens & Buckley as attorneys for the Receiver in the Main Receivership Case and subsequently appeared and presented oral argument to this Court in the Main Receivership Case in opposition to the employment of the Receiver's counsel.

16. After the Adjunct Case was assigned to Judge Austin, Defendants, through counsel, filed a Motion for Change of Judge pursuant to RCW 4.12.050.

17. At the time of the ruling on Defendants' Motion for Change of Judge, this Court had made no discretionary rulings in this Adjunct Case, but had made numerous discretionary rulings in the Main Receivership Case after the Defendants

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had jointly filed a Special Notice of Appearance

18. The Receiver opposed the Motion for Change of Judge in this Adjunct Case, and a hearing was held.

CONCLUSIONS OF LAW

1. RCW 7.60.160(2) provides that litigation by or against a receiver is adjunct to the main receivership case, and that adjunct litigation shall be referred to the judge assigned to the receivership case.

2. The provisions of RCW 7.60.160 are a clear legislative mandate on how receivership matters are to be pled, processed, and assigned. They are specific in nature and rest discretion in the assigned receivership court.

3. The new receiver statute, RCW 7.60, *et seq.*, shows a legislative intent to vest administrative and judicial control of receiverships and adjunct litigation in one judge so it can be judicially managed as one overall litigation matter.

4. RCW 4.12.050 is a general statute regarding seeking a change of judge. RCW 7.60.160 is a specific statute regarding the assignment of adjunct receivership cases to the same judge assigned to the main receivership case.

5. The specific provisions of RCW 7.60.160 regarding assignment of the case take precedence over the general provisions of RCW 4.12.050.

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6. A party in adjunct litigation brought by or against a receiver that is assigned, pursuant to RCW 7.60.160, to the same judge assigned to the main receivership case is not by right entitled to a change of judge in the adjunct case.

7. Under the circumstances of this case, granting a change of judge would lead to a waste of judicial resources and may lead to inconsistent results. For example, and without limitation, this Court will have to rule on the merits of the Proof of Claim that LeMaster & Daniels submitted against WML in the Main Receivership Case. The factual and legal issues involved in the Proof of Claim that LeMaster & Daniels submitted to the Receiver against WML in the Main Receivership Case will be decided in the main case. Those issues overlap and are intertwined with and inseparable from the issues involved in WML's claims for relief pled against LeMaster & Daniels and Wyatt in this Adjunct Case as well as the issues involved in the counterclaims for relief asserted by these Defendants against WML in this Adjunct Case. Another court may come to a ruling on the merits of the claims and counterclaims in this Adjunct Case that would be inconsistent with the rulings of this Court on the Proof of Claim submitted by LeMaster & Daniels in the Main Receivership Case if the Adjunct Case were assigned to another judge. Even if another court came to the same result, judicial economy would not be achieved

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because both parties would have to present the same evidence twice.

8. Affording, as a matter of right, a different judge for each potential claimant may exhaust judicial resources, cause inconsistent results, time delays, and create chaos instead of efficient administration of justice as contemplated by the new receivership statute.

9. This Court has made numerous discretionary rulings in the Main Receivership Case, and LeMaster & Daniels and Wyatt have participated therein as described above after they filed their Special Notice of Appearance.

~~10. In addition, pursuant to RCW 7.60.190, LeMaster & Daniels has voluntarily submitted itself to the jurisdiction of this Court by submitting a Proof of Claim to the Receiver.~~

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Change of Judge in the Adjunct Case is hereby **DENIED**.

DONE IN OPEN COURT this 9th day of Feb, 2007.

Robert D. Austin
Superior Court Judge

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Attorneys at Law
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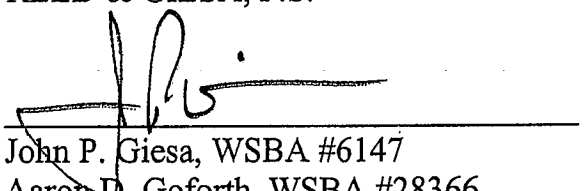
PRESENTED BY:
REED & GIESA, P.S.



John P. Giesa, WSBA #6147
Aaron D. Goforth, WSBA #28366
Attorneys for Barry W. Davidson, in his capacity as Receiver and for Acting General Partner of Washington Motorsports Ltd.

COPY RECEIVED AND APPROVED AS TO FORM;
NOTICE OF PRESENTMENT WAIVED

LUKINS & ANNIS, P.S.

Present but declined to Sign

Michael J. Hines, WSBA #19929
Attorneys for Defendants

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EXHIBIT C

FILED

FEB 06 2004

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

DONALD MATERNE, limited partner of Washington Motorsports Ltd., and ED TORRISON, limited partner of Washington Motorsports, Ltd.,

Plaintiffs,

v.

SPOKANE RACEWAY PARK INC., a Washington for profit corporation and General Partner of Washington Motorsports, Ltd., limited partnership,

Defendant.

NO. 03-2-06856-4

SPECIAL NOTICE OF APPEARANCE

TO: The above-named Plaintiffs and Defendants;

TO: J. Gregory Lockwood of Hackney & Carroll, attorney for Plaintiffs; and,

TO: Carl Oreskovich of Holden & Oreskovich, attorney for Defendant:

YOU WILL PLEASE TAKE NOTICE that LeMaster & Daniels, PLLC, and Larry Wyatt hereby enter their special appearance in the above cause and request that all further pleadings regarding any deposition of Larry Wyatt and/or LeMaster & Daniels, PLLC, or any other employee of LeMaster & Daniels, PLLC, be served upon their attorneys, Lukins & Annis, P.S., at the address below stated.

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ORIGINAL

DATED this 6th day of February, 2004.

LUKINS & ANNIS, P.S.

By _____
ERIKA BALAZS
WSBA # 12952
Attorneys for LeMaster & Daniels, PLLC
and Larry Wyatt

SPECIAL NOTICE OF APPEARANCE: 2

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CERTIFICATE OF MAILING

I hereby certify that on the 6th day of February, 2004, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	Hand-delivered	J. Gregory Lockwood
☒	First-Class Mail	Hackney & Carroll
☐	Overnight Mail	120 N. Wall Street, 5th Floor
☐	Facsimile	Spokane, WA 99201
☐	Hand-delivered	Carl J. Oreskovich
☒	First-Class Mail	Holden & Oreskovich, P.S.
☐	Overnight Mail	6404 N Monroe St.
☐	Facsimile	P.O. Box 18929
		Spokane, WA 99208-0929

Darcey F. Snow

DARCEY F. SNOW

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EXHIBIT D

FILED

FEB 0 3 2006

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

(Copy Receipt) Clerk's Date Stamp

SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE	JUDGE NEAL Q. RIELLY 98
WASHINGTON MOTORSPORTS **Plaintiff(s)/Petitioner(s)** **vs.** LEMASTER & DANIELS **Defendant(s)/Respondent(s).**	**CASE NO. 2006-02-00566-4** **CASE ASSIGNMENT NOTICE AND ORDER** **CASE STATUS CONFERENCE DATE MAY 5, 2006 AT 8:30 AM**

ORDER

2

YOU ARE HEREBY NOTIFIED that this case is preassigned for all further proceedings to the judge noted above. **You are required to attend a Case Status Conference on the date also noted above. The Joint Case Status Report must be completed and brought to the Status Conference. A Case Schedule Order, with the trial date, will be issued at the Status Conference.**

Under the individual calendar system, the court will operate on a four-day trial week. Trials will commence on Monday, Tuesday, Wednesday or Thursday. Motion Calendars are held on Friday. All motions, other than ex parte motions, must be scheduled with the assigned judge. Counsel must contact the assigned court to schedule motions and working copies of all motion pleadings must be provided to the assigned court at the time of filing with the Clerk of Court. Pursuant to LCR 40 (b) (10), motions must be confirmed no later than 12:00 noon two days before the hearing by notifying the judicial assistant for the assigned judge.

Please contact the assigned court to schedule matters regarding this case. You may contact the assigned court by phone, court department e-mail or through the Spokane County Superior Court web page at **http://www.spokanecounty.org/superiorcourt**

DATED: 02/03/2006

ELLEN KALAMA CLARK
PRESIDING JUDGE

NOTICE TO PLAINTIFF: The plaintiff shall serve a copy of the Case Assignment Notice on the defendant(s

EXHIBIT E

SUPERIOR COURT OF WASHINGTON IN AND FOR SPOKANE COUNTY

WASHINGTON MOTORSPORTS, LTD., by and through Barry W. Davidson, in his capacity as Receiver and as Acting General Partner, Plaintiff, v. LEMASTER & DANIELS, P.L.L.C., a Washington limited liability company, and LARRY D. WYATT and JANE DOE WYATT, husband and wife, Defendants.	NO. 06-2-00566-4 DECLARATION OF ERIKA BALAZS IN SUPPORT OF DEFENDANTS' MOTION FOR CHANGE OF TRIAL JUDGE

ERIKA BALAZS states as follows:

1. I am one of the attorneys for the Defendants in the above-captioned action. I make this declaration of my personal knowledge.

2. I learned that the above-captioned action had been filed when I reviewed a court docket website on the internet. At that time, I requested of my assistant, Darcey Snow, to check out the court file so that we could obtain copies of the pleadings.

3. When Ms. Snow brought the file to my office, it contained a copy of the Complaint as well as the order assigning the case to Judge Rielly.

LAW OFFICES OF
LUKINS & ANNIS, PS
A PROFESSIONAL SERVICE CORPORATION
717 W Sprague Ave., Suite 1600
Spokane, WA 99201
Telephone: (509) 455-9555
Fax: (509) 747-2323

4. A few days later, I contacted Mr. Davidson's office indicating that we would accept service on behalf of the Defendants. Mr. Davidson responded that he would send us copies of the pleadings. He never did so.

5. On May 1 or 2, 2006, I contacted Judge Rielly's courtroom to inquire about the case scheduling conference set for May 5. At that time, Judge Rielly's assistant informed me that the case was no longer assigned to Judge Rielly but had been assigned to Judge Austin.

6. Upon learning that the case had been reassigned, I arranged a meeting with my clients to discuss the case assignment.

7. As soon as the decision was made regarding a motion to change judge, the appropriate documents were filed.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED at Spokane, Washington, this 26th day of May, 2006.

ERIKA BALAZS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of May, 2006, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Mr. John P. Giesa Reed & Giesa, P.S. 222 N Wall, #410 Spokane, WA 99201-0873	☐ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☐ Telecopy (FAX) ☒ Email: jpgiesa@reedgiesa.com
Mr. Barry W. Davidson Davidson - Medeiros, P.S. Bank of America Building, Suite 1280 601 W Riverside Ave Spokane, WA 99201	☐ U.S. Mail ☐ Hand Delivered ☐ Overnight Mail ☐ Telecopy (FAX) ☒ Email: bdavidson@davidson-medeiros.net

ERIKA BALAZS

LAW OFFICES OF
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EXHIBIT F

(Copy Receipt) (Clerk's Date Stamp)

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

WASHINGTON MOTORSPORTS LTD. Plaintiff/Petitioner	CASE NO. 06-2-00566-4
vs.	MOTION, CERTIFICATE AND ORDER FOR CHANGE OF JUDGE
LEMASTER & DANIELS, P.L.L.C., et al. Defendant/Respondent	Clerks Action Required (ORCJ)

I. Motion

The undersigned, based on the following certificate, moves the court for an Order for Change of Judge.

II. Certificate

2.1 I am: Larry D. Wyatt, a defendant in the above entitled action;
(Name and Title)

2.2 I believe that a fair and impartial trial in this case cannot be had before: Judge Robert D. Austin
(Judge)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

May 4, 2006, Spokane, Washington
(Date and Place)

Larry D. Wyatt (moving party)

III. Order

The motion is: ☑ Granted ☐ Denied because prior discretion has been exercised.
☐ Denied because the motion is untimely under CR 40(f) / CrR 8.9 / RALJ 8.9 C.

Dated May 4, 2006, 2006

Presented by: Erika Balazs, Lukins & Annis, P.S.

WSBA # 12952

Judge ROBERT D. AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2006, I caused to be served via email a true and correct copy of the foregoing document addressed to the following:

John P. Giesa
Reed & Giesa, P.S.
222 N Wall, #410
Spokane, WA 99201-0873
jpgiesa@reedgiesa.com

Barry W. Davidson
Davidson - Medeiros, P.S.
601 W Riverside Ave, Suite 1280
Spokane, WA 99201
bdavidson@davidson-medeiros.net

DARCEY F. SNOW
of Lukins & Annis, P.S.

EXHIBIT G

Clerk's Date Stamp

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

WASHINGTON MOTORSPORTS LTD

Plaintiff(s)/Petitioner(s),

vs.

LEMASTER & DANIELS PLLC ETAL

Defendant(s)/Respondent(s).

CASE NO. 2006-02-00566-4

ORDER OF PREASSIGNMENT (ORP)

ID NUMBER: 94

ORDER

IT IS HEREBY ORDERED that this case is preassigned for all further proceedings to: JUDGE JEROME J. LEVEQUE.

DATED: 5/10/2006

ELLEN KALAMA CLARK
PRESIDING JUDGE

COPIES MAILED TO:

BRUCE K MEDEIROS
ERIKA BALAZS
JOHN P GIESA

EXHIBIT H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SPOKANE COUNTY

Washington Motorsports Limited Partnership, a/k/a Washington Motorsports, LTD., by and through Barry W. Davidson, in his capacity as Receiver and as Acting General Partner, Plaintiff,	
vs.	NO. 2006-2-00566-4
	Memorandum Opinion
Lemaster & Daniels, P.L.L.C., a Washington, Limited liability company, and Larry D. Wyatt and Jane Doe Wyatt, husband and wife, Defendants,	

The Receiver Statute *RCW 7.60 et seq* has been in existence since 1854.

The Statute remained unchanged from 1881 until 2004. The statute used to read – *RCW 7.60.040* – "The receiver shall have power, under control of the court, to bring and defend actions... as the court may authorize." The statute was silent as to venue or case assignment issues and no annotation on these issues have been found.

In 2004 this statute was extensively modified and amplified. Pursuant to new *RCW 7.60.160* the receiver for Washington Motorsports brought suit against Lemaster and Daniels P.L.L.C. and Larry D. Wyatt etux. Mr. Wyatt was the accountant for Orville Moe and Spokane Raceway Park and Washington Motorsports. Mr. Wyatt provided extensive testimony at the receivership trial. Counsel for Defendant Lemaster and Daniels and Wyatt have moved for change of Judge based on affidavit of prejudice under *RCW 4.12.050*, which allows for one change of Judge in any action or proceeding in a Superior court. This statute is general in nature and has been interpreted to mean this statute gives any litigant "a right to one change of Judge." Hanns *vs. Neptune Orient Lines LTD, 67 WA App. 681 (1992)*. This is a general, statutory right, not found in Federal Court nor administrative agencies under Federal and State Laws. This procedure,

if properly followed, would certainly be available to a litigant under the old *RCW 7.60.040*:

The 2004 amendments to *RCW 7.60 et seq* now states in a new section *RCW 7.60.160 (2)*

> "Litigation by or against a receiver is adjunct to the receivership case. The clerk of the court shall assign a cause member that reflects the relationship of any litigation to the receivership case. All pleadings in the adjunct litigation shall include the cause number of the receivership case as well as the adjunct litigation number assigned by the clerk of the court. All adjunct litigation shall be referred to the judge, if any, assigned to the receivership case."

In this case, the cause of action is by the receiver against the former accountant of Plaintiff. The accountant has also filed a claim in the receivership with the Receiver. The clerk assigned an adjunct case # 2006-02-00566-4 in this case, to the Receivership file # 2003-02-06856-4 and has been referred to this court, per the new statute.

The question presented is, does the mandates of the new *RCW 7.60.160 (2)* specifically override the general statutory right afforded any litigant under *RCW 4.12.050.*

A reading of the new receiver statute in its entirety shows a legislative intent to vest administrative and judicial control of receivership matters into one managed litigation by one Judge. The legislative intent appears to model itself on the bankruptcy court model.

Here, this trial court could rule on the viability of the accountant's claim in the receivership without making the accountant a litigant or subjecting the claim to a *RCW 4.12.050* change of judge.

In bankruptcy, the bankruptcy judge has the option of hearing unliquidated or disputed claims itself or referring such matters to another tribunal for determination, an option not specifically granted under *RCW 7.60.* Instead, adjunct litigation by or against the receiver is authorized and is to be "referred" to the receiver court. Conceivably the

receiver court could hear the adjunct matter, or assign it to another court, much like a bankruptcy Judge. Nothing in *RCW 7.60* says the receiver court must hear the matter.

The provisions of RCW 7.60.160 are clearly a legislative mandate on how receivership matters are to be plead, processed and assigned. They are specific in nature and rest discretion in the assigned receivership court. This new process appears to recognize that receiverships can be very complex in legal theories and management and may involve many different parties. Affording, as a matter of right, a different judge for each potential claimant may exhaust judicial resources, cause inconsistent results, time delays and create chaos instead of efficient administration of justice as contemplated by the new statute.

A rule of statutory construction states "that when there is a conflict between one statutory provision which treats a subject in a general way and another which treats the same subject in a specific manner, the specific statute will prevail." Pannell vs Thompson, *91 W2 591 (1979).*

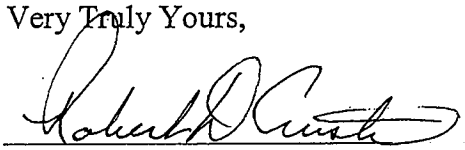
Here *RCW 7.60 et seq* does not say a litigant is prohibited from filing a *RCW 4.12.050* affidavit of prejudice. Nor does it say the receiver Judge shall hear an adjunct matter. It does say the matter shall be "referred to the receiver Judge, supposedly for that Judge's discretion to hear or reassign the matter. It is only by implication that an affidavit would not be allowed in a receiver adjunct matter." To view the new statute otherwise would render the legislation meaningless.

Therefore, this court holds that the specific provisions of *RCW 7.60.160* take precedence over the general provisions *RCW 4.12.050* and hold that a litigant is an adjunct proceeding to a receivership is not by right, entitled to a change of Judge.

In exercising discretion to grant a request for change of judge this court will analyze the considerations enumerated above. Here, Lemaster and Daniels and Wyatt have filed a claim in the receivership. This court will have to rule on the merits of that claim. I may rule to grant the claim only to have an inconsistent result if another court ruled to deny the merits of the claim and grant the receiver a judgment. This scenario points out the wisdom of *7.60.160.* Another scenario might be this courts ruling and that of another court might be the same, but to reach that point both sides would need to present the same evidence twice. This is not judicial economy.

Please present appropriate orders consistent with this ruling.

Very Truly Yours,



Robert D. Austin,
Superior Court Judge